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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

Misc. No. 613

KOGER A. WILSON, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR DISTRICT OF COLUMBIA IN OPPOSITION

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OPINIONS BELOW

The opinion of the Municipal Court of Appeals for the District of Columbia is reported at 108 A. 2d 376.

There was no opinion by the United States Court of Appeals for the District of Columbia Circuit and its order denying an appeal from the judgment of the Municipal Court of Appeals for the District of Columbia is not reported, but a copy thereof appears in the certified transcript of record.

The order of the United States Court of Appeals for the District of Columbia Circuit denying petitioner's motion for leave to file a motion for reconsideration and oral argument, time having expired, appears in the certified transcript of record.

JURISDICTION

The judgment of the Municipal Court for the District of Columbia (Criminal Division) was entered November 24, 1953 (R. 1499). The judgment of the Municipal Court of Appeals for the District of Columbia was entered October 26, 1954 (R. 1546). The order of the United States Court of Appeals for the District of Columbia Circuit denying an appeal from the Municipal Court of Appeals for the District of Columbia was entered February 21, 1955. The order of the United States Court of Appeals for the District of Columbia Circuit denying petitioner's motion for leave to file out of time a motion for reconsideration and oral argument was entered March 16, 1955.

The petition for a writ of certiorari was filed April 22, 1955, and, although it does not contain a statement of the grounds upon which the jurisdiction of this Court is based, petitioner, in his application for extension of time within which to file a petition for writ of certiorari, stated that the jurisdiction of this Court was invoked under Rule 37 (b) of the Federal Rules of Criminal Procedure and Title 28, Section 1254, United States Code.

QUESTIONS PRESENTED

1

May this Court review the discretion exercised by the United States Court of Appeals for the District of Columbia Circuit in denying an appeal to it from a judgment of the Municipal Court of Appeals for the District of Columbia?

Did the United States Court of Appeals for the District of Columbia Circuit abuse its discretion when it denied an appeal from the judgment of the Municipal Court of Appeals where the record disclosed that the matter involved was one of purely local law and that there was substantial evidence to support the judgment of conviction?

STATUTES INVOLVED

Revised Judicial Code, 1948 Edition
Title 28, U. S. C., Chap. 81, § 1254
Act of Congress approved April 1, 1942
56 Stat. 195, Chap. 207, §§ 7, 8
Title 11, §§ 772, 773, D. C. Code, 1951 Edition
Act of Congress approved January 24, 1934
48 Stat. 323, Chap. 4, § 9
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REGULATIONS INVOLVED

Alcoholic Beverage Control Regulations, Section 15, page 45

RULES OF COURT INVOLVED

Rules of the United States Court of Appeals for the District of Columbia Circuit Governing Review of Cases from the Municipal Court of Appeals for the District of Columbia, Rules 1, 9 and 10
Rules of the Municipal Court for the District of Columbia, Criminal Division, Rule 7

The pertinent text of the Statutes and Rules of Court involved are set forth in the Appendix hereto.

STATEMENT OF THE CASE

Petitioner was charged and, on November 24, 1953, was found guilty by a jury in the Municipal Court for the Dis-

trict of Columbia of the possession for sale and the sale of alcoholic beverages without a license in violation of the Alcoholic Beverage Control Law of the District of Columbia [1] (R. 1499). A motion for a new trial or in the alternative for a judgment of acquittal was denied (R. 1533). Petitioner appealed to the Municipal Court of Appeals for the District of Columbia which, on October 26, 1954, affirmed the judgment of conviction (R. 1546). On February 21, 1955, the United States Court of Appeals for the District of Columbia Circuit denied a petition for allowance of an appeal, and thereafter denied petitioner's motion for leave to file a motion for reconsideration, the time for filing having expired. Then followed the petition to this Court for a writ of certiorari.

In the information upon which petitioner was convicted (R. 1499), it was charged that on July 12, 1953, he, with others, kept for sale and sold alcoholic beverages without a license in violation of the Alcoholic Beverage Control Law.

Motions by the petitioner for the return of property (R. 1512), for bill of particulars (R. 1515), for severance (R. 1520), to quash and dismiss information (R. 1521), to suppress evidence (R. 1526), to quash arrest, to quash arrest warrant, and to suppress evidence (R. 1527, 1529) were, after argument, denied (R. 4-382).

The information upon which petitioner was convicted (R. 1499), together with an information containing thirty-two counts which charged the petitioner and others with the commission of similar offenses during the period June 5, 1953, through July 6, 1953 (R. 1484), and an information charging another with the offense of transporting alcoholic beverages on July 12, 1953, in violation of the Alcoholic Beverage Control Regulations [2] (R. 1502) were, on motion of the government, consolidated for trial (R. 164).

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[1] Alcoholic Beverage Control Act, 48 Stat. 323, Ch. 4, § 9 (§ 25-109, D. C. Code, 1951 Edition).

[2] Alcoholic Beverage Control Regulations, § 15, p. 45.

The cases, as consolidated, were tried to a jury commencing on the 16th day of July, 1953, and there was evidence from which the jury could have found, and did find, that during the period June 5, 1953, through July 12, 1953, petitioner, with headquarters in a house in the 2000 block of Portner Place, N. W., engaged in and participated with others in the open and notorious possession and street sale of alcoholic beverages without a license. Petitioner frequently parked his automobile on Portner Place, N. W., and cases of bottles and cans were removed therefrom and carried into premises 2020 Portner Place, N. W. On occasions bottles were removed from petitioner's automobile and distributed to his co-defendants and to others who were thereafter observed to pass bottles to persons seated in automobiles and to receive from such persons money (R. 524, 674, 676-678, 694, 709, 715, 717, 781-783, 801-803, 918-919, 973-977, 1014, 1015).

On the basis of affidavits furnished by police officers who observed petitioner in his activity, an arrest warrant was issued and petitioner was placed under arrest shortly after he parked his automobile on Portner Place, N. W. (R. 1122). Upon search of petitioner's automobile several cases of bottles labeled "Whiskey" were found in the trunk (R. 1136-1141, 1155-1158). On the person of petitioner was found a five-dollar bill, the serial numbers of which corresponded with the serial numbers of a five-dollar bill which, together with another five-dollar bill (R. 1193), was a short time prior thereto given by a police officer to one of petitioner's co-defendants in payment for one fifth of whiskey (R. 1024-1025).

The petitioner had not been issued a license to sell alcoholic beverages (R. 1235).

SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the District of Columbia Circuit having denied petitioner an appeal to it

from the judgment of the Municipal Court of Appeals affirming the judgment of conviction, this case is not a "case in the Court of Appeals" within the purview of Title 28 U. S. C. § 1254, and is therefore not reviewable by the Supreme Court of the United States on writ of certiorari.

The matters involved arose out of the enforcement of laws of purely local application and the local Municipal Court of Appeals having decided that there was substantial evidence in the record to support the judgment of conviction, in the absence of a demonstration of prejudicial error, the United States Court of Appeals for this Circuit did not abuse its discretion in denying the petition for allowance of an appeal to it.

ARGUMENT

I

This Court is Without Jurisdiction Under 28 U. S. C. § 1254, to Review the Action of the United States Court of Appeals for This Circuit in Denying an Appeal to it From the Municipal Court of Appeals.

The petitioner would have this Court review the exercise of discretion by the United States Court of Appeals for the District of Columbia Circuit in denying an appeal to it from a judgment of the Municipal Court of Appeals which affirmed a judgment of conviction by the Municipal Court for the District of Columbia in a bootlegging case (R. 1546). To this end petitioner has invoked the provisions of 28 U. S. C. §1254, which provides in pertinent part that:

> "§ 1254. *Courts of appeals; certiorari;* * * * Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * * "

Inasmuch as the United States Court of Appeals for this Circuit denied the petition for allowance of an appeal, this

case is manifestly not a "case in the courts of appeals" reviewable by this Court under 28 U. S. C. § 1254, *supra*. See *Ferguson* v. *District of Columbia*, 270 U.S. 633, 46 S.Ct. 355, 70 L. Ed. 771, where a writ of certiorari to review the action of the United States Court of Appeals for this Circuit denying a writ of error to the Police Court of the District of Columbia was denied for want of jurisdiction under § 240 of the Judicial Code, as amended by the Act of February 13, 1925, Chap. 229, 43 Stat. 938 (now 28 U. S. C. § 1254). See also *Nowinski* v. *Hagner and Company*, D. C. Mun. App., 100 A. 2d 452, appeal denied U. S. C. A., D. C., cert. den. 347 U. S. 991, 98 L. Ed. 1124.

II

Ordinarily This Court Will Not Take Jurisdiction to Review Cases Involving the Enforcement of Laws of Purely Local Application In the District of Columbia.

As hereinbefore stated, the petitioner was charged and convicted in the Municipal Court for the District of Columbia, Criminal Division, of violations of the Alcoholic Beverage Control Law, (§ 25-109, D. C. Code, 1951 Edition, *supra*), which is of purely local application.

The Congress has provided for a review of judgments of the Municipal Court for the District of Columbia as of right by the Municipal Court of Appeals [§ 11-772, D. C. Code, 1951 Edition] and the Congress has provided further that:

> "Any party aggrieved by any judgment of The Municipal Court of Appeals for the District of Columbia may seek a review thereof by the United States Court of Appeals for the District of Columbia by petition for the allowance of an appeal. § 11-773, D. C. Code, 1951 Edition."

As a general rule this Court will not review decisions of the courts of the District of Columbia based upon or con-

struing statutes limited in their application to, or which declare the common law of, the District of Columbia. *American Security & T. Co.* v. *District of Columbia*, 224 U. S. 491, 32 S. Ct. 553, 56 L. Ed. 856; *Del Vecchio* v. *Bowers*, 296 U. S. 280, 285, 56 S. Ct. 190, 80 L. Ed. 229; *District of Columbia* v. *Pace*, 320 U. S. 698, 702, 64 S. Ct. 406, 88 L. Ed. 408. See *United Surety Company* v. *American Fruit Product Company*, 238 U. S. 140, 35 S. Ct. 828, 59 L. Ed. 1238. See also *Griffith* v. *United States*, 336 U. S. 704, 718, 69 S. Ct. 814, 93 L. Ed. 993, rehear. den. 337 U. S. 921, 69 S. Ct. 1152, 93 L.Ed. 1730; *Fisher* v. *United States*, 328 U. S. 463, 66 S. Ct. 1318, 90 L. Ed. 1382, 166 A. L. R. 1176.

Since there has been no decision by the United States Court of Appeals for this Circuit on any question of Federal law, this case is clearly not of the class of cases contemplated by Rule 19 (b) of the Rules of this Court.

III

The United States Court of Appeals for the District of Columbia Circuit Did Not Abuse its Discretion When it Denied the Petition for Allowance of an Appeal.

The petitioner contends here, as he did below, that it was prejudicial error to deny his motion for severance. The joinder of the offenses of keeping for sale and the sale of alcoholic beverages with which petitioner and others were charged in two informations (R. 1484, 1499) was clearly authorized by Rule 7 of the Criminal Rules of the Municipal Court which provides:

> "(a) *Joinder of Offenses.* Two or more offenses may be charged in the same information in a separate count for each offense if the offenses charged are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

"(b) *Joinder of Defendants.* Two or more defendants may be charged in the information if they are alleged to have participated in the same act or transaction or in the same *series of acts or transactions consisting of an offense or offenses.*" (Emphasis supplied)

The offenses charged in the two informations were of the same or similar character extending over a period commencing on the 5th day of June, 1953, and ending on the 12th day of July 1953, and were so interrelated and connected as to time and place as to constitute parts of a common plan.

The joinder of offenses and defendants under substantially similar circumstances has been approved by the highest judicial authority in this jurisdiction. See *Maynad et al.* v. *United States*, __ U. S. App. D. C. __, 215 F. 2d 336; *Shaw* v. *United States*, __ U. S. App. D. C. __, 29 F. 2d 298, cert. den. 74 S. Ct. 430, 347 U. S. 905, 98 L. Ed. 1063; *Beard et al* v. *United States*, 65 App. D. C. 231, 83 F. 2d 837; *Kelleher* v. *United States*, 59 App. D. C. 167, 35 F. 2d 877; *Simcic* v. *United States*, D. C. Mun. App., 36 A. 2d 98, aff. 91 U. S. App. D. C. 102, 198 F. 2d 951.

Petitioner contends, however, that the joinder of offenses and defendants under circumstances disclosed by this record was prohibited under the doctrine of *McElroy* v. *United States*, 164 U. S. 76, 17 S. Ct. 31, 41 L. Ed. 355, decided by this Court in 1896. But that case is easily distinguishabe. There the several charges in the four indictments consolidated for trial were not against the same person nor did they cover the same acts or transactions or two or more acts or transactions connected together. Accordingly, this Court said with respect to the indictments that they were "* * * not for two or more acts or transactions of the same class of crimes or offenses which might be properly joined, because they were substantive offenses, separate and distinct, complete in themselves and independent of each other,

committed at different times and not provable by the same evidence."

Here the acts or transactions charged in the two informations consolidated for trial were of the same class and character and the persons named in the several counts thereof were alleged to have participated in acts or transactions which fitted easily into two classifications: (1) the possession of alcoholic beverages for sale, and (2) the sale of alcoholic beverages at definite times and within a clearly defined area.

Under the circumstances, it was not prejudicial error to deny petitioner's motion for severance. Nor was it prejudicial error to consolidate for trial the two informations (R. 1484, 1499) with an information charging one of petitioner's co-defendants with the transportation of alcoholic beverages in violation of the Alcoholic Beverage Control Law, *supra*.

Paragraph (c) of Rule 7 of the Criminal Rules of the Municipal Court, *supra*, provides:

> "*Trial Together of Informations.* The court may order two or more informations to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single information. The procedure shall be the same as if the prosecution were under such single information."

The consolidation of informations for trial has been authorized on the theory that public considerations of economy and speed outweigh any possible unfairness to accused. Thus, it has been held that consolidation should be permitted when, as here, the charges are so closely connected that the evidence offered in support of the charges would have been admissible if any of the informations had been separately tried.

And so it was in *Dunaway* v. *United States*, 92 U. S. App. D. C. 299, 205 F. 2d 23. There reversable error was claimed

by reason of the consolidation for trial of three separate indictments. Each indictment charged house-breaking on a different day and at a different place. Two of the indictments contained additional counts charging larceny at the place alleged in the related house-breaking count. The consolidation was objected to on the ground that it was prejudicial in that offenses were not alleged to have been committed on the same day. The Court said that since the cases were of the same or similar character their consolidation was permissible under the Criminal Rules, citing *Smith* v. *United States*, 86 U. S. App. D. C. 195, 180 F. 2d 775.

Upon examination of the entire record, it is manifest that there was no error affecting any rights of the petitioner. Each and every other point raised in support of the petition was urged below and was necessarily considered and resolved by the United States Court of Appeals for this Circuit since that court denied the petition for allowance of an appeal.

Petitioner contends, however, that the court below misconceived the law as declared by this Court and in other federal circuits. But this contention is clearly without merit since this Court has on numerous occasions said that rules followed in federal courts generally in criminal matters do not necessarily prevail in the courts of the District of Columbia. See *Griffith* v. *United States*, 336 U. S. 704, 713-715, 93 L. Ed. 993, 69 S. Ct. 814, *supra; Fisher* v. *United States*, 328 U. S. 463, 66 S. Ct. 1318, 90 L. Ed. 1382, 166 A. L. R. 1176, *supra*. See also *District of Columbia* v. *Pace*, 320 U. S. 698, 702, 64 S. Ct. 406, 88 L. Ed. 408, *supra*.

What is abundantly clear from the record is that petitioner has endeavored to convert a case of a purely local nature into one involving a non-existing constitutional issue, and, as this Court said in *United Surety Company* v. *American Fruit Product Co.*, 238 U. S. 140, 35 S. Ct. 828, 59 L. Ed. 1238, *supra*, at page 142:

> "The constitutional point is a mere pretext put forward in order to open other questions that otherwise could not come here."

It is, therefore, submitted that on the basis of the record it cannot be said and, indeed, petitioner has not demonstrated that the Court of Appeals for the District of Columbia Circuit abused its discretion in denying an allowance of appeal to it from the Municipal Court of Appeals for the District of Columbia.

CONCLUSION

For the foregoing reasons, the respondent respectfully submits that the petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

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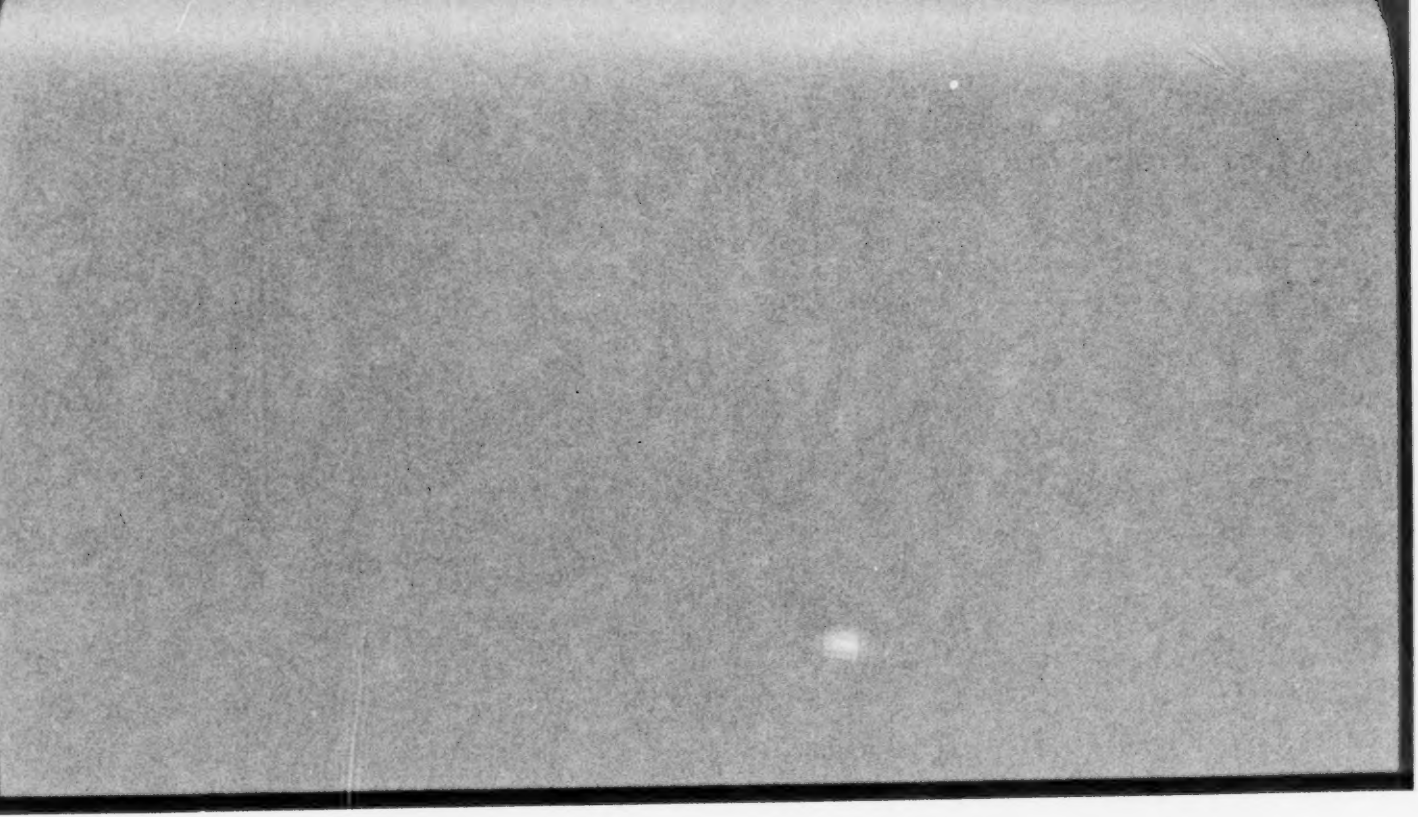
APPENDIX



STATUTES INVOLVED

Revised Judicial Code, 1948 Edition, Title 28, U. S. C., Chap. 81, § 1254. *Courts of appeals; certiorari;* * * * Cases in the courts of appeals may be reviewed by the Supreme Court in the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *

District of Columbia Code, 1951 Edition, Title 11 § 772. *Right to appeal—Final order or judgment—Interlocutory orders—Appeals to United States Court of Appeals for the District of Columbia—Procedure—Printing of record or briefs on appeal—Scope of review—Retroactive effect.*

(a) Any party aggrieved by any final order or judgment of The Municipal Court for the District of Columbia, * * * may appeal therefrom as of right to The Municipal Court of Appeals for the District of Columbia.

(b) * * *

(c) The Municipal Court of Appeals for the District of Columbia * * * shall review the record on appeal and shall affirm, reverse, or modify the order or judgment in accordance with law. If the issues of fact shall have been tried by jury, The Municipal Court of Appeals for the District of Columbia shall review the case only as to matters of law. * * *

(d) * * *

District of Columbia Code, 1951 Edition, Title 11 § 773. *Review of judgments in United States Court of Appeals for the District of Columbia—Procedure.*

Any party aggrieved by any judgment of The Municipal Court of Appeals for the District of Columbia may seek a review thereof by the United States Court of Appeals for the District of Columbia by petition for the allowance of an appeal. The clerk of said United States Court of Appeals within ten days after the entry of such judgment, the contents of the petition to conform to the requirements which said United States Court of Appeals may by rule prescribe. * * * If said Court of Appeals shall allow an appeal, the court shall review the record on appeal and shall affirm, reverse, or modify the order or judgment in accordance with law. (Apr. 1, 1949, 56 Stat. 196, ch. 207, § 8.)

District of Columbia Code, 1951 Edition, Title 25, § 109. *Sale without license prohibited—Exceptions.*

(a) No individual, partnership, association, or corporation shall, within the District of Columbia, manufacture for sale, keep for sale, or sell any alcoholic beverage without having first obtained a license under this chapter for such manufacture or sale, except as provided in section 25-131.

RULES OF COURT INVOLVED

United States Court of Appeals for the District of Columbia Circuit.

Rule 1. *Character of Cases Which May be Considered.*

Allowance of an appeal from the Municipal Court of Appeals is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicates the character of reasons which will be considered:

(a) Where the court below has decided a question of substance not theretofore determined by this court:

or in a way probably not in accord with applicable decisions of this court; or contrary to a decision of the Supreme Court of the United States or of the District Court of the United States for the District of Columbia, or contrary to general law.

(b) Where the court below has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the trial court, as to call for an exercise of this court's power of supervision.

(c) Where a question of general importance, or a question of substance relating to the construction or application of statutes or municipal ordinances or regulations, may be involved which has not been, but should be, settled by this court.

Rule 9. *Entry of Orders Allowing or Denying Appeal.*

Whenever an appeal is allowed or denied, the clerk of this court shall enter an order to that effect, and shall forthwith notify the court below and the parties in this court or their attorneys of record. No mandate issues upon the denial of an appeal.

Rule 10. *Reconsideration.*

Whenever an appeal is denied, a petition for reconsideration may be served and filed within 5 days after the entry of the order denying the appeal. The respondent may serve and file an answer thereto within 5 days after the filing of the petition for reconsideration. No further papers shall be filed without leave of this court.

Municipal Court for the District of Columbia, Criminal Division.

Rule 7 (a). *Joinder of Offenses.* Two or more offenses may be charged in the same information in a separate count for each offense if the offenses charged are of the

same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) *Joinder of Defendants.* Two or more defendants may be charged in the information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions consisting of an offense or offenses.

(c) *Trial Together of Informations.* The court may order two or more informations to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single information. The procedure shall be the same as if the prosecution were under such single information.